

United States District Court  
Eastern District of California

United States of America,

Plaintiff,

vs.

Amado Betancourt Reyes,

Defendant.

No. Cr. S 96-0407 DFL

Civ. S 00-1433 MCE PAN P

Findings and Recommendations

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November 4, 1997, a jury convicted defendant of possessing methamphetamine and conspiring to distribute methamphetamine and possess methamphetamine with intent to distribute it. April 9, 1998, the court sentenced him to 292 months imprisonment, five years of supervised release, and \$200 in special assessments. The court of appeals affirmed April 29, 1999.

June 30, 2000, defendant moved to vacate or set aside his sentence. 28 U.S.C. § 2255. He claims error based on the government's use of confidential informant Mendoza as a witness,

1 the court's requirement that defendant take the stand and  
2 testify before it would instruct on entrapment, and prosecutorial  
3 vouching for Mendoza's credibility. Most of these issues were  
4 rejected by the Ninth Circuit in deciding defendant's appeal.  
5 Defendant procedurally defaulted any issues not raised on appeal.  
6 United States v. Ratigan, 351 F.3d 957 (9th Cir. 2003).

7 The court appointed counsel and April 2, 2001 defendant  
8 filed an amended motion to correct sentence. Defendant argues  
9 his sentence violates the Sixth Amendment because it was based on  
10 a drug quantity not found by a jury beyond a reasonable doubt.  
11 Apprendi v. New Jersey, 530 U.S. 466 (2000). The government  
12 opposed May 25, 2001, and defendant replied July 25, 2001.

13 The United States Supreme Court has held that the rationale  
14 set forth in Apprendi applies equally to defendants sentenced  
15 under the Federal Sentencing Guidelines. United States v.  
16 Booker, \_\_\_ U.S. \_\_\_, 125 S.Ct. 738 (2005). Nevertheless, the  
17 Ninth Circuit consistently has held Apprendi claims cannot be  
18 raised on initial collateral review. United States v. Sanchez-  
19 Cervantes, 282 F.3d 664 (9th Cir. 2002); Cooper-Smith v.  
20 Palmateer, 397 F.3d 1236, 1245-46 (9th Cir. 2005). All courts to  
21 have addressed the issue conclude Booker does not apply  
22 retroactively on collateral review either. Varela v. United  
23 States, 400 F.3d 864, 868 (11th Cir. 2005); Humphress v. United  
24 States, 398 F.3d 855, 860 (6th Cir. 2005); Guzman v. United  
25 States, 404 F.3d 139, 141 (2d cir. 2005). Therefore claims in  
26 the amended motion fail.

1 Accordingly, the court hereby recommends:

2 1. Defendant's June 30, 2000, motion to vacate or set aside  
3 his sentence be denied.

4 2. Defendant's April 2, 2001, amended motion to vacate or  
5 set aside his sentence be denied.

6 3. The clerk of the court be directed to close the  
7 companion civil case number Civ. S 00-1433 MCE PAN P.

8 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these  
9 findings and recommendations are submitted to the United States  
10 District Judge assigned to this case. Written objections may be  
11 filed within 20 days of service of these findings and  
12 recommendations. The document should be captioned "Objections to  
13 Magistrate Judge's Findings and Recommendations." The district  
14 judge may accept, reject, or modify these findings and  
15 recommendations in whole or in part.

16 Dated: October 31, 2005.

17 /s/ Peter A. Nowinski

18 PETER A. NOWINSKI

19 Magistrate Judge  
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